IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision :September 17th , 2007

+ **Test Case No.8/1994**

Mr. Subroto Ghosh . ..... PETITIONER
! Through: Mr.Rajiv Endlaw, Advocate

Vs.

$ State & ors .....RESPONDENTS
^ Through : Nemo.

CORAM :-
* **HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not ?
3. Whether the judgment should be reported in the Digest? No

ANIL KUMAR, J. (Oral)

1. This judgment shall dispose of the petition under Section 276 of the Indian Succession Act for the grant of probate of the Will dated 19th November, 2005 of late Shri Himadri Narayan Ray. The petitioner filed the probate as an executor of the last Will and testament of late

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Shri Himadri Narayan Ray contending inter alia that the Will dated 19th November, 2005 was executed by late Shri Himadri Narayan Ray which was attested by Sh.Steven Joseph Grey; Kan Fatt Lee and Emily Yee Lan Lee.

2. The testator, late Shri Himadri Narayan Ray, died on 16th February, 2006. He had a fixed place of abode at C-18, Friends Colony East, New Delhi and moveable properties of the deceased are within the jurisdiction of this Court.

3. According to the executor/petitioner, the moveable assets which are likely to come into the hands of the petitioner are approximately Rs.1,00,00,000/- (Rupees One Crore only) the details of which are given in Schedule-A annexed with the petition. The petitioner has also given the liabilities of the deceased which are stipulated in Schedule-B annexed with the petition. According to Schedule-B annexed with the petition approximately Rs.4,75,000/- is payable. In the circumstances, the petitioner has prayed for the grant of probate in respect of the Will of late Shri Himadri Narayan Ray. The

petitioner has filed death certificate of late Shri Himadri Narayan Ray along with various other documents pertaining to moveable assets of the deceased with various banks.

4. The notice of the petition for the general public was published in the newspaper "The Statesman" and no one has filed any objections to the grant of probate of the Will dated 19th November, 2005 of late Shri Himadri Narayan Ray. Respondent Nos.2 and 3, son and daughter of the deceased respectively, filed the replies to the probate petition contending that they have no objection to the grant of probate to the petitioner in respect of Will of late Shri Himadri Narayan Ray dated 19th November, 2005.

5. The petitioner, thereafter, filed his evidence on affidavit dated 15th May, 2007. The executor/petitioner deposed that the deceased was the husband of his eldest sister Smt. Manjuli Ray who had pre-deceased her husband. According to the petitioner's deposition, late Shri Himadri Narayan Ray died in Ontario, Canada when he was visiting his son, respondent No.2 on 16th February, 2006. However, at

the time of his demise he had a fixed place of abode at C-18, Friends Colony East, New Delhi and he also has all his bank accounts, investments, etc. in Delhi within the jurisdiction of this Court.

6. The petitioner proved the medical certificate and death certificate issued by the Office of the Registrar General, Ontario, Canada which were exhibited as PW-1/1 and PW-1/2. It was deposed that the deceased testator was born Hindu and he died as a Hindu and his mother and his wife had pre-deceased him. The deceased testator had two children, one son and one daughter, respondent Nos.2 and 3 respectively and he did not have any other legal heir. The petitioner deposed that the last Will and testament dated 19th November, 2005 executed by the late Shri Himadri Narayan Ray at Ontario, Canada was forwarded to him by Mr.Steven Joseph Grey along with his affidavit which has been proved as Exhibit PW-1/3. A certificate was also sent from Ontario, Canada which has been proved as PW-1/4. The witness deposed that he has seen late Shri Himadri Narayan Ray writing and signing on account of his long association of about 50 years and he identified the signatures of deceased/testator

late Shri Himadri Narayan Ray on the Will dated 19th November, 2005 on each page. The Will dated 19th November, 2005 was Exhibited as PW-1/5. He also proved the replies filed by respondent Nos.2 and 3 as PW-1/6; PW-1/7 & PW-1/8; PW-1/9. He stated that he has seen respondent Nos.2 and 3 signing and writing. The letters received in respect of moveable properties of the deceased were proved and exhibited by the petitioner as Exhibit PW-1/10 to PW-1/29.

7. The petitioner deposed that the information regarding the movable properties of the assets given in Schedule-A are correct and Schedule-A is based on the information available from Exhibit PW-1/10 to PW-1/29, various correspondence with the various banks and other institutions. Schedule-A is Exhibited as PW-1/30 and the detail giving the liability of the deceased in schedule B was also proved as Exhibit PW-1/31. The petitioner deposed on affidavit which has been exhibited as PW-1/A.

8. The deposition of the attesting witness Kan Fatt Lee was also proved as Exhibit PW-2/A. In his deposition the said attesting

witness deposed that he has witnessed the last Will and testament dated 19th November, 2005 of late Shri Himadri Narayan Ray. The attesting witness deposed that he is a Chartered Accountant by profession and he is practicing at Werbar Investments, 63 Alness St., Unit No.5, Toronto, Ontario M3J2H2. The attesting witness also sought permission to be examined through video conferencing which was allowed by order dated 25th April, 2007. The attesting witness attached his photograph and proved the same as Exhibit PW-2/1. He also attached a copy of his passport and proved the same as Exhibit PW-2/2. He also filed an affidavit notarized by a Notary Public in order to prove his identity. The attesting witness has proved the copy of the Will as Exhibit PW-2/3 on which he identified the places where late Shri Himadri Narayan Ray had signed at point 'A' on each and every pages of Exhibit PW-2/3 and also identified the signatures of the deceased at point 'A' on the last page. He deposed that late Shri Himadri Narayan Ray had signed in his presence. According to him, besides him his wife Ms.Emily Yee Lan Lee also witnessed the Will and he identified and proved the signatures of his wife. He also identified and proved the signatures of Mr.Steven Joseph Grey,

Solicitor who was present at the time of execution of the Will. He also stated that all the attesting witnesses had signed the Will after the testator had signed the Will and the Will was signed in the presence of each other. According to the attesting witness, the deceased was of a sound disposing mind at the time of execution of the Will.

9. The photograph of the attesting witness was proved as Exhibit PW-2/1 and his passport was proved as Exhibit PW-2/2 and a copy of the Will was proved as Exhibit PW-2/3. He was also examined through video conferencing on 21st July, 2007 where he deposed that he has given the affidavit which is signed by him and which was Exhibit as PW-2/A along with the documents. He identified his photograph and his passport. He also saw the original Will Exhibit PW-1/5 and identified the places where late Shri Himadri Narayan Ray had signed the Will and the places where Mr.Steven Joseph Grey, his wife and he had signed in the presence of the deceased testator. He deposed that his statement is correct.

10. From the perusal of the evidence produced by the petitioner on

his behalf and the attesting witness, it is inevitable to infer that the deceased late Shri Himadri Narayan Ray was of a sound disposing mind on 19th November, 2005 when he executed the Will. It has been established that the deceased testator had signed the Will Exhibit PW-1/5 which was attested by three witnesses. Consequently, it has been established that the deceased late Shri Himadri Narayan Ray executed a legal and valid Will dated 19th November, 2005 which is Exhibit PW-1/5.

11. The son and daughter of the deceased have not filed any objection nor there any other document on record to dispute the veracity of the Will and the averments made by the executor of the Will/petitioner.

12. Though the Administrative sub-Judge is competent to grant succession certificate under the Indian Succession Act, however, the jurisdiction of the High Court is concurrent to grant probate in respect of the Will of the deceased. In 37 (1989) Delhi Law Times 324, it was held that the provision for grant of succession certificate does

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not exclude the right to obtain letter of administration. Consequently this Court is competent to grant probate in respect of the Will dated 19th November, 2005 of the deceased in respect of debts and securities also.

13. In R. Venkatachala Iyengar v. B.N. Thimmajamma and Others, (1959) Supp. 1 SCR 426, the Supreme Court has laid down the following propositions bearing on the nature and standard of evidence required to prove a Will:

> 1. Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.
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> 2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.
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> 3. Unlike other documents, the Will speaks from the death of the testator, and therefore, the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect

introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at that time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasize that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the Court has to be satisfied fully that the Will has been validly executed by the testator.

> 6. If a caveater alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

14. Considering the facts and circumstances, it is apparent that the testator was of sound disposing mind at the time of execution of his last testament. There are no suspicious circumstances regarding the last testament of the deceased testator. All the yardsticks and test laid down by the Apex Court in R. Venkatachala Iyengar (supra) are fulfilled. There are no suspicious circumstances and this Court is satisfied that the will dated 19th November, 2005 is the last will of Late Shri Himadri Narayan Ray.

15. Consequently the petitioner has been able to prove that the deceased late Shri Himadri Narayan Ray executed his last will dated 19th November, 2005 and consequently the probate of the will of Late Shri Himadri Narayan Ray for his will dated 19th November, 2005 is

granted to the petitioner as the executor of the said Will under Section 276 read with Section 289 of the Indian Succession Act and the Probate be issued to the petitioner in respect of Schedule A & B annexed with the petition in the Form set forth in Schedule VI of the Indian Succession Act subject to petitioner furnishing of requisite Court-fees and necessary Bond with one surety. Accordingly, the petition stands disposed of.

16. The petitioner shall appear before the Joint Registrar for furnishing bond and for paying the Court fees on 28th September, 2007 .

ANIL KUMAR J.

September 17th, 2007
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